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No. 16-111

In the Supreme Court of the United States

MASTERPIECE CAKESHOP LTD., ET AL.,
Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION, ET AL.,
Respondents.

On Writ of Certiorari to the Colorado Court of Appeals

BRIEF OF AMERICAN UNITY FUND AND PROFS. DALE CARPENTER AND EUGENE VOLOKH AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a requirement to bake a wedding cake should be viewed as a "speech compulsion" akin to a requirement to write, sing, paint, or photograph.

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INTEREST OF THE *AMICI CURIAE*[1]

American Unity Fund (AUF) is a 501(c)(4) nonprofit organization dedicated to advancing the cause of freedom for LGBTQ Americans by making the conservative case that freedom truly means freedom for everyone. AUF thus believes that the First Amendment protects the rights of both supporters and critics of same-sex relationships; but it believes that Petitioners' First Amendment rights are not actually implicated in this case.

Profs. Dale Carpenter and Eugene Volokh are law professors who specialize in the First Amendment, and have written extensively on (among other things) how the First Amendment applies to antidiscrimination law. (Carpenter is also the Senior Policy Advisor to AUF.) They believe that (1) antidiscrimination law cannot constitutionally be used to compel writers, photographers, painters, singers, and similar speakers to create expression related to weddings, but (2) a line must be drawn between such constitutionally protected expression and baking, clothing design, architecture, and other activities.

They signed (and Eugene Volokh took the lead in drafting) an *amicus curiae* brief in *Elane Photography*, Brief of *Amici Curiae* Cato Institute, Eugene Volokh, and Dale Carpenter in Support of Petitioner, *Elane Photography, LLC v. Willock*, 309 P.3d (N.M. 2013),

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, financially contribute to preparing or submitting this brief. All parties have consented to this filing.

cert. denied, 134 S. Ct. 1787 (No. 13-585) (2013), arguing for point 1 noted above; they did the same in the New Mexico Supreme Court stage of that lawsuit, 309 P.3d 53 (N.M. 2013). In this brief, though, they argue that bakers need not be treated like photographers: Even if this Court believes photographers, singers, and writers may not be compelled to create photographs, sing, or write, it does not follow that bakers may not be compelled to create cakes. Conversely, if this Court believes that Masterpiece may be compelled to create cakes, it should make clear that this does not extend to such inherently and traditionally speech-creating businesses as writers, singers, and photographers.

SUMMARY OF ARGUMENT

The freedom not to speak must include the freedom not to create speech, and not to participate in others' speech. A freelance writer cannot be punished for refusing to write press releases for the Church of Scientology, even if he is willing to work for other religious groups. A musician cannot be punished for refusing to play at Republican-themed events, even if he will play at other political events, and even if the jurisdiction bans discrimination based on political affiliation in public accommodations.[2] Likewise, a photographer or a wedding singer should not be punished for choosing not to create photographs celebrating a same-sex wedding, or for choosing not to sing at such a wedding.

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[2] *See, e.g.*, D.C. CODE § 2-1411.02 (2001); V.I. CODE tit. 10, § 64(3) (2006); SEATTLE, WASH. MUN. CODE §§ 14.06.020(L), .030(B) (2017).

But this First Amendment right must have its limits. The First Amendment shields refusals to *speak*, but generally not refusals to do things. Limousine drivers, hotel operators, and caterers should not have a Free Speech Clause right to exempt themselves from antidiscrimination law, because the law is not compelling them to speak or to create First-Amendment-protected expression. The same limit should apply to wedding cake makers.

Likewise, the First Amendment shields refusals to participate in others' speech—say, as an actor or a musical accompanist or a singer—but not all conduct can be labeled participation: consider again the limousine driver, hotel operator, or caterer. This Court has rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968). There must also be limits set on the variety of conduct compulsions that can be labeled "speech compulsions," and on the degree and quality of involvement that can be labeled compelled "participation" in a ceremony. This case calls on this Court to define those limits, while still preserving the rights of those who are genuinely being coerced into creating First-Amendment-protected expression.

Amici express no views on any Religion Clauses objections to the decision below.

ARGUMENT

I. The Free Speech Clause bars compelling people to create speech and similar expression—but not all efforts that produce aesthetically pleasing products are covered by the Clause

The government may not compel people to speak. Likewise, the government may not compel people to create speech or other protected expression. For this reason, the government cannot compel photographers, videographers, graphic designers, printers, painters, or singers to record, celebrate, or promote events they disapprove of, including same-sex weddings.[3] *Amici* thus generally agree with those parts of the discussion in Parts I, III, and IV of the *Amici Brief* of the Cato Institute *et al.* that apply to those traditionally expressive media. Brief for the Cato Institute, Reason Foundation, and Individual Rights Foundation as *Amici Curiae* in Support of Petitioners ("Cato Br."). (Indeed, two of the *amici* signed a similar brief in *Elane Photography*, which endorsed those arguments in a case involving a wedding photographer.)

But to properly implement the Free Speech Clause, courts must distinguish "speech" from other endeavors. Some actions cannot count as speech, even if they are "expressive," "artistic," or "creative" in the broad sense of using a person's creativity and mental

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[3] For examples of such attempted compulsions, see *Elane Photography, LLC* v. *Willock*, 309 P.3d 53 (N.M. 2013) (photographer); *Lexington Fayette Urban Cty. Human Rights Comm'n* v. *Hands on Originals, Inc.*, No. 2015-CA-000745-MR, 2017 WL 2211381 (Ky. Ct. App. May 12, 2017) (T-shirt printer).

effort to produce something original, even something original and beautiful.

A chef, however brilliant, cannot claim a Free Speech Clause right not to serve certain people at his restaurant, even if his dishes look stunning. The same is true for bakers, even ones who create beautiful cakes for use at weddings. It is generally constitutional—whether or not wise or just—for the law to compel behavior, and only a small subset of such compulsions violates the First Amendment.

This Court can draw the necessary line for deciding what is a speech compulsion by referring to the line used to decide what is a speech restriction. Thus, for instance, if a city were to restrict (purely as an economic protectionist measure) the number of newspapers or printers in the city, that would violate the First Amendment because it would restrict an activity that is treated as speech (printing), whether or not the speech restriction could be viewed as "incidental" to the protectionist purpose. Likewise a city would violate the Speech Clause if it were to restrict freelance writers, photographers, or singers.

But a city may limit the number of butchers or cab drivers in the city (unwise as many such regulations will be), *Slaughter-House Cases*, 83 U.S. 36 (1873), because those activities do not implicate the First Amendment. The same is true for restaurants or bakeries, even ones that create beautiful dishes or beautiful cakes. And if a restriction on the ability to bake cakes is not a speech restriction, then a requirement that one bake cakes (even for ceremonies one disapproves of) is not a speech compulsion.

In *Texas* v. *Johnson*, 491 U.S. 397 (1989), *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557 (1995), and *Rumsfeld* v. *FAIR*, 547 U.S. 47 (2006), this Court set forth a test that can help draw these lines. Conduct is considered symbolic expression if one of two conditions is present:

1. "An intent to convey a particularized message was present, and ... the likelihood was great that the message would be understood by those who viewed it," *Johnson*, 491 U.S. at 404 (quoting *Spence* v. *Washington*, 418 U.S. 405, 410-11 (1974)), so long as the message would be so understood based on the conduct alone and not on any accompanying speech, *Rumsfeld*, 547 U.S. at 66; or

2. The speech falls within a generally expressive medium, such as painting, music, poetry, parading, displaying flags, or wearing armbands, even when the particular speech is abstract and lacks a "particularized message," *Hurley*, 515 U.S. at 569.

See, e.g., *Rumsfeld*, 547 U.S. at 65 (applying the intent-and-likelihood test); *id.* at 64 (separately discussing inherent expressiveness of the medium).

The first condition is not satisfied in this case because baking a wedding cake *by itself* does not show an intent to convey a particularized message that would likely be understood by those who view it. The main question here is rather whether the second condition regarding the general expressiveness of the medium as a whole is satisfied.

A. A medium is covered by the Free Speech Clause when it is historically protected or inherently expressive

Deciding whether a particular medium is generally expressive requires a degree of judgment and line-drawing; but tradition, history, and common experience usually offer a sound basis for drawing those lines. Paintings, for instance, have long conveyed messages, whether about religion, politics, the character of the painting's subject, or the beauty of the scene that the painting depicts. Having courts decide case by case whether a particular painting conveys enough of a message would require aesthetic judgments that courts are ill-equipped to make.

But when the medium as a whole mainly consists of items that do not convey a message (except perhaps insofar as words may be written on them), it is not protected by the First Amendment—even when the items may be designed with aesthetics in mind and even when the creator subjectively intends to "express" something by the creation. Landscaping, for instance, can be beautiful and artistic, and "expressive" of the designer's judgment. But laws requiring people to keep their lawns cut do not pose First Amendment problems. *Gul* v. *City of Bloomington*, 22 N.E.3d 853 (Ind. Ct. App. 2014).

Likewise, public hearings about approval of architectural plans sometimes consider aesthetics, *see, e.g.*, *Ifrah* v. *Utschig*, 98 N.Y.2d 304, 308 (2002),[4] but have

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[4] "Here, there was evidence of the distinctive neo-Tudor architectural style of the houses lining Fenimore Drive, popular

not been seen as requiring First Amendment scrutiny. Whatever Takings Clause problem there might be with treating certain buildings as architectural historic landmarks, such designations have not been seen as posing a Free Speech Clause content discrimination problem. *See, e.g., Penn Cent. Transp. Co.* v. *City of N.Y.*, 438 U.S. 104, 108 (1978) (describing landmark laws as being based in part on the landmarks' "architectural significance").[5]

This Court's cases have generally treated a medium as protected when it has historically and traditionally been recognized in the law as expressive. Parades, for example, have "'from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.'" *Hurley*, 515 U.S. at 579 (quoting *Hague* v. *Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.)). Many precedents evidence this tradition. *See, e.g., Hurley* (annual Irish-American parade); *Edwards* v. *South Carolina*, 372 U.S. 229 (1963) (civil rights protest march); *Gregory* v. *Chicago*, 394 U.S. 111 (1969) (procession conveying grievances to city government).

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when those homes were built more than 60 years ago, which would be disturbed by the addition of a modern home on the subdivision." *Ifrah*, 98 N.Y.2d at 308. Such considerations might be seen by some as petty, intrusive, and inconsistent with private property rights; but they do not violate the First Amendment.

[5] Applying landmarking laws to a church, which prevents the church from altering its design or even tearing down the building, may interfere with the church's religious freedom rights, but for reasons specific to religious institutions. *See, e.g., First Covenant Church of Seattle* v. *City of Seattle*, 840 P.2d 174 (Wash. 1992).

But cake-making—even cake-making for ceremonial occasions (such as weddings and birthdays)—lacks any such longstanding legal recognition as an expressive medium. Indeed, petitioners and their *amici* have cited no decisions from any court offering such recognition. Given the long history of wedding cakes, the absence of case law protecting such cake-making cannot be chalked up to novelty (unlike, say, a paucity of cases dealing with website design). Instead, the absence of any case law protecting the expressiveness of cake baking suggests that it has not been regarded in our constitutional tradition as a medium of expression. That makes cake baking distinct from long-recognized mediums of expression such as writing, singing, or photography.

And it makes sense that no such tradition has arisen, because cake-baking (unlike a protest march) is not an "inherent[ly] expressive[]" medium. *Hurley*, 515 U.S. at 568. In *Hurley*, the Court had no trouble concluding that parades are inherently expressive because they have little or no non-expressive function. "If there were no reason for a group of people to march from here to there except to reach a destination, they could make the trip without expressing any message beyond the fact of the march itself." *Id.* at 568. Writing, singing, and photography are likewise almost exclusively expressive by function and design.

Cake baking, though, is not inherently expressive. Its dominant purposes are functional. For the consumer, baked goods chiefly provide calories and taste. For the baker, baking primarily offers income through providing people with filling and tasty food, but is not chiefly a means of conveying messages. Most of what

cake bakers do falls within "the vast realm of nonexpressive conduct." *Id.* at 567. Cakes do not convey the rich, complex expression that can be conveyed by words, music, images, and the like; and to the extent that cakes are used in ceremonies, their significance is inextricably tied to their being eaten, not to any message they visually convey.

To be sure, cakes often do convey messages in the writing or graphics on the cake itself. Cake-makers might indeed have a First Amendment right to decline to include such written or graphic messages on a cake. The cake itself, though intended for use in a ceremony, is not itself generally expressive of any message (other than perhaps the fact that "this cake is intended for use in this ceremony").

Nor can wedding cakes be viewed as inherently expressive, or traditionally protected, simply by raising the level of generality and calling wedding-cake-making "art."[6] Much in life is art in the sense that it is

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[6] *See, e.g.*, Brief for Petitioners at 1, 5, 9 ("Pet. Br.") ("[I]t would not be just a bakery, but an art gallery of cakes." "Phillips approaches cake design as an art form." "[Phillips] would consider it sacrilegious to express through his art an idea about marriage that conflicts with his religious beliefs."); *see also* Brief for the States of Texas et al. as Amici Curiae in Support of Petitioners at 2 ("Texas et al. Br.") at 2 ("This case is about the freedom of artistic expression . . . ."); Brief of *Amicus Curiae* The First Amendment Lawyers Association in Support of Petitioners, at 7, 13 ("First Am. Lawyers Ass'n Br.") (stating that the relevant question is "whether art is 'speech' within the meaning of the First Amendment," and that protection of "art" does not depend

aimed at creating beauty, including beauty identifiably linked with some ceremony or some style. Cooking is often said to be an art.[7] Even setting the table to present food is an art, with a long historical pedigree.[8] Subway calls its sandwich-makers "sandwich artists."[9] But a restaurant may not refuse to cook or prepare a table for certain customers on the ground that would be a speech compulsion.

Clothing designers likewise try to create aesthetically appealing clothes, and clothing is often said to "make a statement." Indeed, some clothing, such as a woman's pantsuit, may be seen in some time and place as implicitly connected with some symbolism, such as acceptance of professional norms of formal dress, coupled with a view of women's equality with men.

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on whether "the intended message is sufficiently 'particularized'"); Cato Br. at 7 ("Although the Court has not yet considered cake-making, it has identified numerous forms of art as speech.").

[7] *See, e.g.*, HERVÉ THIS, PIERRE GAGNAIRE & M.B. DEBEVOISE, COOKING: THE QUINTESSENTIAL ART (2010); JULIA CHILD & LOUISETTE BERTHOLLE, MASTERING THE ART OF FRENCH COOKING (1971); ANNE VOLOKH, THE ART OF RUSSIAN CUISINE (2d ed. 1989).

[8] CLAUDIA QUIGLEY MURPHY, THE HISTORY OF THE ART OF TABLESETTING: ANCIENT AND MODERN, FROM ANGLO-SAXON DAYS TO THE PRESENT TIME (1921).

[9] *See, e.g.*, Subway, *Regional Jobs*, http://www.subway.com/en-us/careers/regionaljobs. They are educated at the University of Subway, *id.*; though they apparently do not get M.S.A. degrees, the Wall Street Journal has quoted more prominent "sandwich maestros" in an article titled *Master the Art of the Sandwich*. Karen Strabiner, WALL ST. J. (Mar. 31, 2016, 11:53 am), https://www.wsj.com/articles/master-the-art-of-the-sandwich-1459439656?mg=prod/accounts-wsj.

But it does not follow that clothing choices are protected by the First Amendment (whether or not one can argue that they should be protected by the Due Process Clause or the Ninth Amendment, or that sex-based dress codes may violate the Equal Protection Clause). *See, e.g.*, *Zalewska* v. *Cty. of Sullivan*, 316 F.3d 314, 320 (2d Cir. 2003) ("a person's choice of dress or appearance in an ordinary context does not possess the communicative elements necessary to be considered speech-like conduct entitled to First Amendment protection"). And it likewise does not follow that decisions by custom clothing designers or manufacturers to discriminate among customers are protected by the First Amendment.

Hairstyles are similarly supposed to be aesthetically appealing, and can convey links to particular attitudes. But the First Amendment does not preclude the government from heavily regulating entry into the occupation of hairdressing, though a similar regulation aimed at, say, writers or singers would be an unconstitutional prior restraint. Likewise, a hairdresser who, for instance, refuses to do a cornrow hairstyle for a white customer[10] or refuses to cut a woman's hair in what he sees as an improperly masculine hairstyle,

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[10] *See, e.g.*, Kareem Abdul-Jabbar, *Cornrows and Cultural Appropriation: The Truth About Racial Identity Theft*, TIME (Aug. 26, 2015), http://time.com/4011171/cornrows-and-cultural-appropriation-the-truth-about-racial-identity-theft/; Maisha Z. Johnson, *7 Reasons Why White People Should Not Wear Black Hairstyles*, EVERYDAY FEMINISM (July 28, 2015), https://everydayfeminism.com/2015/07/white-people-black-hairstyles/.

cannot claim a First Amendment freedom from compelled speech.

Many occupations boast of their artistry or, as one amicus brief asserts, at least "'bear[] some of the earmarks of an attempt' at art." Texas at al. Br. at 9. For every Masterpiece Cakeshop there is a Masterpiece Hair and Masterpiece Plastic Surgery—and, though these names might be facetious or puffing, Masterpiece Limousine and Masterpiece Plumbing.[11]

Lines between First-Amendment-protected expression and other conduct and products must be drawn, or else every regulation would be subject at least to the First Amendment scrutiny applicable to content-neutral rules. Jackson Pollock paintings are protected because they are special cases of a broad medium—painting—that has long been used to communicate expression. But even if art is protected, not all art-like things can be. Marcel Duchamp's urinal might be art in a museum, and indeed might be treated as purely a sculpture when it is not used for its traditional function. Yet functional urinals are not generally protected expression, even though they have aesthetic qualities even in a restroom and not just in a museum.

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[11] Masterpiece Hair, http://www.masterpiecehair.com/; Masterpiece M.D.: A Regenerative Health Spa, http://www.masterpiecemedspa.com/about-us/ ("You only have one Canvas. Make it a Masterpiece."); Masterpiece Limousine, http://www.masterlimos.com; Masterpiece Plumbing, http://masterpieceplumbing.com.

To say that baked goods, including very beautiful ones or ones intended for special occasions, are protected forms of "art" would trivialize the First Amendment. It cannot be that "an apparently limitless variety of [baked goods] can be labeled 'speech'" because they are artistically creative. *O'Brien*, 391 U.S. at 376; *see also* First Am. Lawyers Ass'n Br. at 16. Unless the profession or conduct under consideration is described with more specificity, effectively any form of human activity could be recast as a form of First Amendment protected expression.

B. Masterpiece Cakeshop was not compelled to engage in symbolic expression

To be sure, even some activities that are not inherently expressive may be so treated if they are intended to and likely to convey a particular message. The use of fire is not inherently expressive. Even burning paper (say, by crumpling up newspaper to help build a fire) is not inherently expressive. But burning a book might well be expressive enough to trigger meaningful First Amendment scrutiny. Likewise, compelling someone to burn a book may be treated as a speech compulsion.

But the Commission's order compels Masterpiece only to "cease and desist from discriminating against [Craig and Mullins] and other same-sex couples by refusing to sell them wedding cakes or any product it would sell to heterosexual couples." *Craig* v. *Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 286 (Colo. Ct. App. 2015). The order does not compel symbolic conduct or the production of any particular cake that might constitute expression, either with or without writing, symbols, or other design elements.

This is not a case involving cake customization, as the uncontested facts show. In 2012, Respondent Craig and Mullins walked into Masterpiece Cakeshop and were looking through a photo album of owner Jack Phillips's custom-designed cakes. Phillips sat down to greet them at a consultation table. According to Phillips's own account, "the men said they wanted a wedding cake for 'our wedding.'" Phillips replied that he does not "create wedding cakes for same-sex weddings." Phillips then added, "I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same-sex weddings." Joint Appendix ("App.") 168. The couple got up and left, with no further discussion. The entire exchange lasted 20 seconds. *Id.* at 169. Respondents' cake was eventually baked in white frosting with internal rainbow colors on one level, *id.* at 175-76, but no such idea was mentioned to Phillips.

Indeed, the Colorado Court of Appeals "recognize[d] that a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage and, in such cases, First Amendment speech protections may be implicated." *Masterpiece Cakeshop*, 370 P.3d at 288. But the court did not reach the issue, because "Phillips denied Craig's and Mullins' request without any discussion regarding the wedding cake's design or any possible written inscriptions."[12]

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[12] The Colorado Court of Appeals wrote that Craig and Mullins requested that Phillips "design and create" a cake for their wedding. *Masterpiece Cakeshop*, 370 P.3d at 276 ¶ 3. Petitioners

Indeed, not all of Phillips's wedding cakes are even original designs uniquely crafted for each couple. App. 161 ¶ 39 ("Couples may select from one of our unique creations that are on display in the store, *or* they may request that I design and create something entirely different." (emphasis added)). Had the conversation between Phillips and the Respondents continued beyond 20 seconds, the couple might well have requested a cake that triggered no concerns about compelled expression. For all Phillips knew, Craig and Mullins might have settled on a preformulated cake design from Phillips' photo album and asked Phillips simply to execute it to their specifications (regarding, for example, the height, diameter, or number of levels of the cake). In that case, "there would be little to suggest the baker was involved in a creative or artistic endeavor." First Am. Lawyers Ass'n Br. at 17 n.5.

Or the couple could have asked Phillips to sell them a cake, if one were available, that had already been made and was sitting in a display case. *See* Pet. Br. at 58 (suggesting narrowing construction of Colorado law that would deny exemption for "selling premade items to the public"). There is no reason to think

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repeat this claim in their briefing to this Court. *See* Reply in Support of Petition for a Writ of Certiorari at 4 ("And the Colorado Court of Appeals acknowledged that Craig and Mullins 'requested that Phillips *design and create a cake to celebrate their same-sex wedding*.'" (emphasis in original)). But the Colorado Court of Appeals did not cite anything in the record to support the assertion. Phillips' own account of the 20-second meeting, in his affidavit, says nothing about a request that he "design and create" a cake. Instead, he says the couple told him simply that they "wanted a wedding cake for 'our wedding.'" App. 168.

that Masterpiece Cakeshop's selling a bland, nondescript, or premade cake for a same-sex wedding would be intended to and likely would be perceived as symbolic expression. *See Rumsfeld*, 547 U.S. at 61, 66 (concluding that mere compliance with antidiscrimination law, there as to the provision of interviewing rooms, is not compelled speech, and noncompliance would not be protected symbolic expression).

And even if all of Phillips' wedding cakes could be described as custom-made, *see* Pet. Br. at 1; Brief for the United States as Amicus Curiae Supporting Petitioners at 2 ("U.S. Br."), not all acts of customization are expressive. Everything from automobiles to shoes may be customized, allowing individualized consumer choices among innumerable option combinations. For example, even after substantially reducing ordering complexity in 2009, Ford made its popular F-150 truck available for order by individual buyers "in nearly 10 million combinations of trim series, colors, engines, body styles and options."[13] It does not follow that every Ford F-150 bears a message protected by the First Amendment, much less that an order requiring Ford to sell trucks without discrimination to gay and straight car buyers would be a speech compulsion.

The relevant Free Speech Clause question is not whether a merchant customizes a product, but whether the customization communicates protected expression. Here, the facts reveal no specific request for an expressive message—and no such message was

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[13] Amy Wilson, *Ford Reins in F-150 Order Combinations*, AUTOMOTIVE WEEK (Aug. 19, 2008, 12:01 am), http://www.autonews.com/article/20080819/ZZZ_SPECIAL/113735/ford-reins-in-f-150-order-combinations).

necessarily present. No one looks at a wedding cake and reflects, "the baker has blessed this union." For most cakes, people do not even think, "the baker has designed this cake to convey someone else's message about the union." Phillips may subjectively believe that making the cake would have communicated a message about his clients' marriage, but there is not a substantial likelihood "that the message would be understood by those who viewed it." *Johnson*, 491 U.S. at 404 (quoting *Spence*, 418 U.S. at 411).

Phillips' refusal to make the cake is thus a refusal to engage in conduct, not a refusal to create speech. That refusal violated Colorado's public accommodations law; even if Phillips would have been willing to serve same-sex couples in other contexts, he was unwilling to serve them in this one. Some legislatures may choose to exempt bakers from public accommodations laws when it comes to same-sex weddings. But the Free Speech Clause does not mandate such exemptions.

C. Cake bakers retain broad First Amendment rights as to actual speech

As the Colorado Civil Rights Commission has acknowledged, a wedding cake baker could decline "to create cakes that feature specific designs or messages that are offensive." Brief of the Colorado Civil Rights Commission in Opposition at 11. Such refusals would not constitute discrimination based on a protected classification but would instead be based on opposition to the customer's articulable message.

Requiring bakers to design a cake using certain words, symbols, or other politically significant design

elements, might likewise be an unconstitutional speech compulsion. If state law were interpreted as requiring bakers to include specific messages, *amici* think that the compulsion may indeed violate the First Amendment. Even if the choice to wear certain styles of clothing is not protected by the First Amendment, restrictions on wearing certain words on clothing are unconstitutional, *see Cohen* v. *California*, 403 U.S. 15 (1971); the same goes for cakes. An architectural regulation that bars murals with a certain content—or for that matter, a ban on any signs, regardless of content, placed in a home's windows, *see, e.g.*, *City of Ladue* v. *Gilleo*, 512 U.S. 43 (1994)—would likewise violate the First Amendment: That would be a regulation of a traditionally protected medium (paintings or words) and not of a traditionally unprotected one (architecture).

But just as restricting bakeries, including bakeries that do custom orders, does not restrict speech, so compelling bakers to simply produce a cake that does not contain a message does not compel speech. While requiring a baker to create cakes with specific messages may be a speech compulsion, no such requirement was imposed here. This case is about Phillips' categorical refusal to provide a particular sort of product to customers based solely on their sexual orientation reflected in the event for which the product was to be provided,[14] in violation of a state public accommodations law. It is not about any refusal on Phillips' part to speak through his cake creations.

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[14] Masterpiece Cakeshop has refused to provide even a cupcake for a lesbian couple's commitment ceremony. App. 73, 82, 113-14.

D. If accepted, Petitioners' Free Speech Clause claims would apply to a vast range of conduct

Petitioners' First Amendment objection to providing cakes for the weddings of same-sex couples cannot be limited (1) to cakes, (2) to weddings, or (3) to same-sex couples.

1. Cakes are not the only customized "artistic" goods that may express messages. Petitioners and their *amici* reassure the Court that their claims apply only to a narrow class of expressive products and services. Thus, they assert, this case does involve employment discrimination, Pet Br. at 58-59, or a refusal to serve couples at hotels or restaurants, Texas et al. Br. at 7 (distinguishing such "non-expressive" conduct), or declining to rent a pavilion for an event, First Am. Lawyers Ass'n Br. at 24, or discrimination by caterers or limousine service operators, Cato Br. at 3. But if the protection against compelled speech extends beyond mediums that have traditionally and historically been recognized as primarily expressive, and if the protection goes beyond inherently expressive goods and services, many professionals could claim similar protection.

Indeed, in this very case, 479 "Creative Professionals" have filed an amicus brief supporting Masterpiece Cakeshop. Brief of 479 Creative Professionals as *Amici Curiae* in Support of Petitioner at Appendix A (listing professionals from all 50 states). Among those claiming First Amendment protection for their professions are: a seamstress, a milliner, a stage-lighting designer, event planners, a knitter, a needle maker, and a paper crafter. *See id.* at 2a, 4a, 7a, 8a, 12a, 17a, 18a.

All of these professions and more may be described as "expressive" in some broad sense. But they cannot be constitutionally exempt from having to sell all their goods and services, no matter how interchangeable, premade, or routinized, for any event they object to, no matter how remote they are personally from the event or how unlikely it is that their good or service will be associated with them personally.

2. Weddings are not the only occasions people celebrate. Phillips told Craig and Mullins that he would bake them a cake for a birthday or shower, but there is nothing in the logic of Petitioners' argument that would prevent him from claiming constitutional protection against baking goods for those occasions as well. Birthdays and showers are meaningful events in a family's life and the appearance of a cake at those events helps in the celebration of them. Already one baker has refused to sell a birthday cake that a lesbian sought to purchase for her wife, explaining "we do not do cakes for same sex weddings *or parties*."[15]

3. Nor would the potential exemption cases be limited to claims of discrimination based on sexual orientation. Public accommodations laws commonly forbid discrimination on the basis of race, national origin, color, religion, and sex. "Government cannot compel private artistic expression [here, wedding cakes]—ever," asserts an amicus brief filed on behalf of 20 states. "So here, 'it is both unnecessary and incorrect to ask whether the State can show that the statute is

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[15] Frank Carber, *Ohio Baker Refuses to Make a Birthday Cake for Lesbian Customer*, METRO WEEKLY (July 12, 2016), http://www.metroweekly.com/2016/07/ohio-baker-make-birthday-cake-lesbian-customer/ (emphasis added).

necessary to serve a compelling interest and is narrowly drawn to achieve that end.'" Texas et al. Br. at 24. Under that view, even race discrimination in the sale of wedding cakes and other broadly "artistic" products and services would be shielded.

To be sure, sometimes the freedom of speech may include the right to discriminate based on race, religion, sex, and the like. Just as the director of a musical may have the right to choose actors based on the actors' race, *see, e.g.*, *Claybrooks* v. *ABC*, 898 F. Supp. 2d 986, 996 (M.D. Tenn. 2012), so an actor must have the right to choose which jobs to accept, even if the choice is racially discriminatory. As the Summary Argument noted and as the Cato Brief argues in detail, Cato Br. 3-5, 10-15, writers should be free to refuse to take freelance assignments from religious denominations whose views they condemn. But these situations should be rare First Amendment exceptions from generally applicable antidiscrimination laws; the petitioners' theory, if taken seriously, would make those exceptions the rule.

II. The Free Speech Clause bars compulsion to participate in others' expression—but not all creating and supplying of custom goods qualifies as participation

The Free Speech Clause also bars requiring people to actually participate in others' speech or ceremonial expression, religious or secular. An actor who holds himself out as willing to work in commercials, for instance, cannot be penalized for refusing to act in an advertisement for a Southern Baptist Church—even if he is willing to act in advertisements for other reli-

gions, and even if state law treats such selective refusals as forbidden religious discrimination. Likewise, the Government plausibly argues that a wedding photographer or musician cannot be compelled to be "actively involved" in "a ceremony or other expressive event." U.S. Br. at 19-20. That concern about compelled personal participation in speech is supported by decisions like *Hurley* (which held that the government cannot compel an Irish parade to include a particular expressive contingent) and *W. Va. Bd. of Ed.* v. *Barnette*, 319 U.S. 624 (1943) (which held that the government cannot compel children to recite the Pledge of Allegiance).

But not all creating and supplying of goods that may eventually be used in others' expression can qualify as "participation" for Free Speech Clause purposes. In *FAIR*, this Court held that institutions can be required to let speakers onto their property because "schools are not speaking when they host interviews and recruiting receptions," 547 U.S. at 64, and schools are not expressively associating with the visiting interviewers, *id.* at 69-70. Compelling schools to let speakers onto their property is thus not constitutionally forbidden compelled participation in others' speech. *See also PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980). Compelling cake makers to make cakes that will be used in another's speech miles away is, if anything, even more distant from true compelled participation in the speech.

Nor is Phillips' act of delivering a cake to a wedding or wedding celebration participation in the wedding. Phillips sometimes chooses to stay for a wedding ceremony, App. 163 ¶ 47, but it is undisputed that

nothing about Phillips' creation of wedding cakes *necessitates* his attendance at, much less his active participation in, the wedding.

Because the baker does not literally participate in the wedding, the Government is left to argue that he "figuratively participates" in it. U.S. Br. at 8. There is no basis in this Court's precedents for such an extravagantly broad theory of participation.

The entirety of the baker's figurative participation boils down to three elements: he (1) "crafts" the cake before the event, (2) "delivers" the cake to the event, and (3) the cake "plays a central role" in the celebration. U.S. Br. at 28. But, first, whether Phillips was to "craft" anything expressive at all for this event was never decided by the parties, and no expression beyond a requirement not to discriminate has been ordered. *See supra* Part I.B.

Second, if Phillips' delivering the cake means Phillips is participating in the ceremony, then anyone who delivers anything to the celebration—like a table and chairs or food or a limousine for the newlyweds—could be said to "participate."

Third, the government contends that Phillips participates because his "handiwork enables—indeed, plays a central role in—a uniquely expressive ritual." U.S. Br. at 28. But this is the very "conduit to *effectuate another's expression*" that the government correctly claims removes from participation a hotel that provides tables, chairs, and a room. *Id.* at 21 (emphasis added). And the fact that *the cake* is important to the celebration does not mean that Phillips himself is participating. Phillips is not the cake.

Phillips's "participation" in the wedding celebration is much slighter than the law schools' participation in military recruiting in *Rumsfeld*, where the recruiters sought to be physically present in the schools. Phillips' physical presence is not necessary to providing his service and was certainly not ordered by the Commission. Indeed, that he made the cake will not even be known to most attendees; even "masterpieces" on dough and icing are generally not signed the way that masterpieces on canvas are.[16]

Petitioners' and the Government's broad theory of a "right not to participate" would constrain antidiscrimination law in a vast range of situations. Petitioner believes that creating a cake for Respondents' wedding celebration would make him personally an "important part" of the event and would mean he is "associated" with it. App. 162 ¶ 45. It would amount to his "personal endorsement and participation in [a] ceremony and relationship" that he opposes. *Id.* at 153 ¶ 32. The Government likewise argues that the First Amendment bars compelled "figurative" participation, "as when a person designs and crafts a custom-made [product] that performs an important expressive function in the ceremony." U.S. Br. at 19. Yet such theories would convert the First Amendment into a broad anti-

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[16] Some guests at the wedding might possibly ask who made the cake, and would thus learn that Phillips did. Pet. Br. at 24. But such association would be true for any provider of wedding services or goods.

complicity principle punching a hole through the center of the Nation's anti-discrimination laws.[17]

Despite the apparent attempts by the Government to limit the reach of its analysis to the "uniquely" expressive ritual of the wedding, the "figurative participation" theory cannot so easily be limited. As noted in Part I.D *supra*, weddings are not the only event filled with ceremonial meaning: Every celebration, whether of a birthday, a baby shower, an anniversary, a graduation, or anything else, is meant to express a message that some might disapprove of. Indeed, even the process of living together with a lover (whether in a same-sex relationship, a premarital relationship, or an interracial relationship) may be seen by some as symbolic; some landlords may not want to "participate" in such relationships by providing real estate that the lovers will inhabit.[18]

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[17] At one point in its brief, the Government seeks to limit its theory to the "unique circumstances" here where the law "compels [Petitioners] *both* to create expression *and* to participate in an expressive event." U.S. Br. at 23 (emphasis added). At another other point, however, the Government says heightened scrutiny applies "at least" where both elements are present, *id.* at 16, suggesting possible broader application of its unsupported approach. We argue that neither compulsion is present here.

[18] For examples of cases in which landlords brought such "no participation in sin" claims under religious freedom provisions, *see Thomas* v. *Anchorage Equal Rights Comm'n*, 165 F.3d 692 (9th Cir. 1999), *rev'd on standing grounds*, 220 F.3d (9th Cir. 2000) (en banc); *Swanner* v. *Anchorage Equal Rights Comm'n*, 874 P.2d 274, 284 (Alaska 1994); *Smith* v. *Fair Emp. & Hous. Comm'n*, 51 Cal. Rptr. 2d 700 (Cal. 1996); *Jasniowski* v. *Rushing*, 685 N.E.2d 622 (Ill. 1997), *rev'g* 678 N.E.2d 743 (Ill. App. Ct.

Nor could the figurative participation theory be limited to cakes. If Phillips' limited connection to the event is enough participation to trigger First Amendment protection on par with a child being required to recite the Pledge of Allegiance, then providing just about any good or service to the objectionable event would be participation. Masterpiece Cakeshop turned away a lesbian couple wanting cupcakes when the employee taking their order learned they were for the couple's commitment ceremony. App. at 73, 113-14. A bridal shop has refused to sell a wedding dress to a lesbian couple, explaining, "we cannot participate in [a same-sex marriage] due to our personal convictions."[19]

But the mere presence of a product at an event for which it is crafted does not suggest the maker's own participation. If the New York Yankees get custom gloves created for their players, the glove maker does not "participate" in baseball games played across the country even though his work is catered for that narrow purpose. Nor does the ultimate use of the product in an event that has an expressive dimension (a wedding, rather than just a regular family dinner) increase the level of participation. The customer's use of

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1997); *Att'y Gen.* v. *DeSilets*, 636 N.E.2d 233, 242-43 (Mass. 1994); *McCready* v. *Hoffius*, 586 N.W.2d 723 (Mich. 1998), *vacated and remanded*, No. 108995, 1999 WL 226862 (Apr. 16, 1999); *State* v. *French*, 460 N.W.2d 2, 9-11 (Minn. 1990).

[19] Curtis M. Wong, *This Bridal Shop Is Under Fire (Again) for Turning Away a Lesbian Couple*, HUFFINGTON POST (July 24, 2017, 2:40 pm), https://www.huffingtonpost.com/entry/pennsylvania-bridal-shop-lesbian-brides_us_5976160ee4b00e4363e11237?n6j&ncid=inblnkushpmg00000009.

the cake in an expressive event should not be confused with the creator's participation in *someone else's* expression.

Moreover, while a right not to create expression might be limited to custom goods, a right not to supply goods for another's expression would logically cover off-the-shelf goods as well: After all, selling champagne that will be used in symbolic toasts at the wedding is as much—or as little—"figurative participation" in the wedding as is making a cake that will be used in a symbolic cake-cutting ritual, U.S. Br. at 8. Any asserted right against compelled expression has to be limited to participation that is itself "expressive" (even if there is a disagreement about whether wedding cakes are expressive). Otherwise, an asserted right not to participate in others' expression would rest on the expressive quality of the controversial event, not on the expressive quality of the speaker's participation.

III. Complicity claims might justify protection under a Religious Freedom Restoration Act, but not under the First Amendment

To be sure, when it comes to claims of religious exemption—for instance under state or federal Religious Freedom Restoration Acts—an objector may be able to show a "substantial burden" if he sincerely believes that certain compelled action will make him complicit in another's sin, regardless of whether the secular legal system would view his conduct as sufficient participation. *See Thomas* v. *Review Bd.*, 450 U.S. 707 (1981); *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723

F.3d 1114, 1152-53 (10th Cir. 2013) (Gorsuch, J., concurring).

But the Free Speech Clause test for impermissible compelled participation must necessarily be more objective than such a complicity principle. First, the Free Speech Clause is a constitutional guarantee, which categorically trumps inconsistent state and federal statutes. Each jurisdiction's RFRA is just a statute, which can be modified by the legislature if legislators conclude that complicity claims are going too far. Legislatures may thus reasonably allow broad religious exemption regimes, given that any excessive claims can be reined in by simply amending the RFRA to limit its application. Definitions under the Free Speech Clause, on the other hand, cannot be changed by legislatures, and should thus be set forth more cautiously.

Second, strict scrutiny under the Free Speech Clause has generally been more demanding than strict scrutiny under religious exemption regimes. *See, e.g.*, Thomas C. Berg, *The New Attacks on Religious Freedom Legislation, and Why They Are Wrong*, 21 CARDOZO L. REV. 415, 428 (1999) ("[E]ven the compelling interest test would give religious conduct less than an absolute right to exemption from generally applicable laws, while effectively giving per se protection against laws discriminating against religion or against particular forms of speech.").[20] Such powerful

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[20] "'[I]t is the rare case' in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest." *Williams-Yulee* v. *Florida Bar*, 135 S. Ct. 1656, 1665-66

protection should not extend to every action that some might subjectively view as wrongful participation—however indirect—in another's wrongful conduct.

Third, the examples of complicity under religious exemption regimes show how broad a claimed "right not to participate" can be. *Hobby Lobby*, for instance, did not involve employers refusing to create some sort of custom goods: No-one required the owners of Hobby Lobby to design individualized insurance schemes for each employee's contraceptive needs. Rather, this Court concluded that religious objectors were entitled to refuse to provide even off-the-shelf insurance policies, when they thought those policies involved sinful complicity with abortion.

That may be a plausible vision of "participation" when it comes to RFRA rights, which are more easily overcome (either in court or by legislatures). But it would be an unsound vision when it comes to the Free Speech Clause, which provides much stronger protection when speech compulsion is genuinely present.

CONCLUSION

Antidiscrimination laws, like other laws, cannot claim categorical immunity from the Bill of Rights. Hate crimes laws must be enforced consistently with the Sixth Amendment, even if that makes it harder for prosecutors to get convictions. Civil liability for em-

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(2015). But the government will much more often be able to demonstrate that uniform application of a law, with no exemptions, is required despite a state or federal RFRA.

ployment discrimination must be imposed consistently with the Seventh Amendment—even though the prospect that certain juries might not properly enforce the law likely discouraged Congress from authorizing jury trials and damages awards in the original Civil Rights Act of 1964.[21] Likewise, antidiscrimination laws cannot be enforced in ways that violate the First Amendment. *See, e.g.*, *Hurley*, 515 U.S. at 572-73; *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640 (2000); *Hosanna-Tabor Evangelical* v. *EEOC*, 565 U.S. 171 (2012).

But antidiscrimination laws, like other laws, should not be stymied by attenuated claims of incidental burden, where no real constitutional problem is present. *See, e.g.*, *Rumsfeld*, 547 U.S. at 67. Petitioners are "attempt[ing] to stretch . . . First Amendment doctrines well beyond the sort of activities these doctrines protect," and "overstat[ing] the expressive nature of their activity and the impact of the [Colorado antidiscrimination law] on it, while exaggerating the reach of our First Amendment precedents." *Id.* at 70. This Court must draw a line that properly respects both the First Amendment rights of those who are truly being compelled to create speech, and the legitimate interests of states that are trying to protect their citizens from discrimination. Bakers, including bakers of wedding cakes, are on the constitutionally unprotected side of the line.

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[21] *See, e.g.*, David L. Noll, *Regulating Arbitration*, 105 CAL. L. REV. 985, 1021 (2017); Michael A. Wolff, *Stories of Civil Rights Progress and the Persistence of Inequality and Unequal Opportunity 1970-2010*, 37 WM. MITCHELL L. REV. 857, 868 (2011).

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